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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 529

SECURITY INSURANCE COMPANY, PHILADELPHIA FIRE AND MARINE INSURANCE COMPANY, THE HOME INSURANCE COMPANY, THE STANDARD FIRE INSURANCE COMPANY, MILWAUKEE MECHANICS' INSURANCE COMPANY,

Petitioners,

vs.

MAX EDLIN AND IDA EDLIN,

Respondents.

BRIEF FOR RESPONDENT IN OPPOSITION.

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CITATIONS TO OPINIONS BELOW.

The opinion of the District Court for the Southern District of Illinois (App. B of Petition) is reported at 160 F. Supp. 487.

The opinion of the United States Court of Appeals for the Seventh Circuit (App. A of Petition) is reported at 269 F. 2d 159.

JURISDICTION.

The jurisdictional requisites are fully set forth in the Petition.

QUESTION PRESENTED.

Respondent contends that the Petition sets forth no questions which would justify this Court in granting the prayer of said Petition. However, petitioner by stating that three separate questions are presented makes it incumbent upon the respondent to argue those questions in this brief.

STATEMENT.

Petitioners' statement while incorporating much argumentative conclusion, both as to law and fact, does incorporate therein a correct chronology of the factual situation giving rise to this cause. Respondent takes particular exception to certain portions of petitioners' statement. In the second paragraph (Pet. p. 3) they have at least in part misstated the law of Illinois as to the vesting of title in condemnation proceedings. Since argumentative conclusions on questions of law in our opinion have no place "in a Statement of Facts", we reserve comment as to the proper application of Illinois law in this case until the appropriate part of the argument.

In the third paragraph (Pet. p. 3) petitioners have set forth improper and immaterial facts concerning another case which could have no bearing on the issues here presented. In fact, respondents here were successful in that case and this Court at 350 U. S. 902, denied certiorari. The only apparent purpose in referring to the former Edlin case must be a subtle attempt to interject arson into this case with a view toward prejudicing respondents before this Court.

In addition to the Statement of Fact presented by petitioners, we should like to add that this case was orally argued before the Court of Appeals for the Seventh Circuit on September 15, 1958. During the course of those

arguments, one of the counsel for petitioner, John P. Gorman, informed the Court that his firm had entered its appearance in the case of *First Nat'l. Bank of Highland Park* v. *Boston Ins. Co.*, and that the Supreme Court of the State of Illinois had granted petition for leave to appeal to that Court from the decision of the Appellate Court for the First District, which Appellate decision is reported at 17 Ill. App. 2nd 159, 149 N. E. 2d 420. The Court of Appeals upon conclusion of oral arguments kept the case under advisement until June 4, 1959. The *Highland Park* case was decided on May 22, 1959, indicating, of course, that the Court of Appeals before rendering decision in this case waited for the pronouncement of the Illinois Supreme Court in the *Highland Park* case.

ARGUMENT.

The petition under the heading "Reasons for Granting the Writ" sets forth three questions which apparently are grounds for this Court to grant certiorari—(1) that the decision of the Court of Appeals decides an important State question in a way in conflict with State law; (2) that the Court of Appeals for the Seventh Circuit is in conflict with the Court of Appeals for the Eighth Circuit as regards the scope of review to be afforded by such Court; and (3) that the Court of Appeals has misconstrued a decision of this Court, to-wit: *Vandenbark* v. *Owens Illinois Glass Co.*, 311 U. S. 538, 85 L. Ed. 327.

Respondents' position in opposition is that none of the three questions presented, either singularly or collectively, fall within the scope of that which would warrant a review by this Court. The mere fact that petitioners state there is a conflict in decision between the Court of Appeals for the Seventh Circuit and the Court of Appeals for the Eighth Circuit does not make such conflict exist. The contention that the Court of Appeals decided this case in conflict with the applicable law of the State of Illinois is nothing more than a statement by petitioners in an attempt to bring themselves within the purview of Rule 19 of this Court. The argument under this contention is nothing more than an argument on the merits of this case, all of which was urged in their original brief and their petition for rehearing in the Court of Appeals. This is a mere claim by petitioners of erroneous application of purely local jurisdictional decision.

I.

THE DECISION OF THE COURT OF APPEALS IS CLEARLY CORRECT.

While respondents do not feel that an argument on the merits is either appropriate or proper on Petition for Writ of Certiorari, the contents of the Petition make it incumbent upon us to answer the arguments advanced.

Petitioners have confused the broad question as to whether or not the rule of "Indemnity" does or does not apply. Neither this case nor the *Highland Park* case held that the doctrine of indemnity did not apply. The real question decided is: at what time is the amount of the loss to be indemnified, to be determined—at the time of the fire or at some later time taking into consideration collateral and fortuitous circumstances. The rule as applied by the Court of Appeals in this case is the law of Illinois as announced by our Supreme Court in the *Highland Park* case. Simply stated, that the interest to be indemnified is the interest of the insured at the time of the fire and where the insured is the absolute and legal owner, the interest is the full value of the insured building. The Supreme Court of Illinois stated in 17 Ill. 2nd 147, 160 N. E. 2nd 802, p. 805:

> "A New York statute provides: 'The making of a contract to sell or exchange real property shall not constitute a change in the interest, title, or possession, within the meaning of the applicable provisions of any contract of fire insurance, including any contract supplemental thereto, hereafter under covering property located in the state.' (New York Insurance Law, Sec. 170.) Under this statute it has been held that a vendor '* * *' was, *at the time of the fire*, the absolute and legal owner of the insured property so far as appellant (the insurer) was concerned and his insurable interest was the full value of the insured building. '* * *'" (Emphasis ours.)

The Court of Appeals in this case applied the very same application of legal doctrine as announced aforesaid by the Illinois Supreme Court. In their opinion (App. A of Pet. p. 26) the Court of Appeals states as follows:

> "In the case at bar the risk of destruction of the insured property by fire remained with the title and the contract of insurance was personal to the Edlins. Upon them the fire loss fell. At the time of the fire they, as holders of the legal title, possessed a legal interest in the property destroyed, and they became entitled to the proceeds of the policies.
>
> "We, therefore, hold that the Edlins did suffer a loss under the policies issued by the insurers, which loss amounted to more than the aggregate sums of all of said policies and that the insurers are liable to the Edlins on their policies."

The next question then is whether or not at the time of the fire, respondents had full insurable interest in the property to the extent of the value of the building. That they had is not in doubt. In fact, the contrary has never been stated. The Petitioners in their Petition by inference would lead this Court to believe otherwise when in their statement (Pet. p. 3) they state:

> "Pursuant to Illinois law, the value of the property for the purposes of condemnation would be determined as of the date of the filing of the petition and payment to the Edlins of the condemnation award *would effect a retroactive vesting of title in the condemning authority to that date.*"

In the Illinois Appellate Court case of *Bohne* v. *Bauer*, 21 Ill. App. 2d 133; 157 N. E. 2d 545 plaintiff, landlord, sued defendant, tenant, for rents accruing between the date the State of Illinois filed its petition to condemn the demised premises and the date the condemnation award was paid. Defendant denied liability on the theory that when condemnation award was paid, the condemnor's title

related back to the date the petition to condemn was filed (in effect this is the same contention urged by the insurers in the instant case). The Appellate Court, Second District, in affirming for plaintiff stated:

> "Language can be found to support the contention that land is regarded as taken the day the petition to condemn is filed. (Cites case.) This is true in one sense but whether it be considered as a taking or not, it is not a true taking nor is it an extinguishment of the lessor's title. * * *
>
> "The event which completes the taking of the title to land in condemnation is the payment of the judgment. (Cites case.) From the foregoing it is apparent to us that the landlord's title was not extinguished nor was the landlord's property taken in a sense so as to excuse the tenant from the payment of rent, until the judgment was actually paid."

Throughout this protracted litigation petitioners have as they are now doing asserted adamantly, unequivocally and persistently that, both before and after the *Highland Park* case, that the case of *Beman* v. *Springfield Fire and Marine Insurance Co.*, 303 Ill. App. 554, 25 N. E. 2d 603; is the law of Illinois applicable to this case. Respondents have always argued that the *Beman* case by no stretch of the imagination can be considered as authority for the case at bar. The facts are entirely different. The plaintiffs in the *Beman* case at the time of the fire had no legal interest in the property, they merely held an option to re-purchase. The owner of the property at the time of the fire had insurance, as did plaintiffs. Prior to plaintiffs' exercise of its option to re-purchase, the company who insured the owner at the time of the fire had repaired the premises. This is quite different than the instant case and the *Highland Park* case where plaintiffs at the time of the fire were vested with all legal incidents of title.

In addition to the factual distinction, it is most important

to note that at the time of oral argument before the Court of Appeals in the instant case, the same Illinois Appellate Court, in fact, the same Judge, who rendered the opinion in the *Beman* case filed its opinion in *First National Bank of Highland Park* v. *Boston Ins. Co.*, 17 Ill. App. 2nd 147, 149 N. E. 2d 420, without discussion or reference to its prior opinion.

Petitioners' argument would indicate that the Court of Appeals capriciously and arbitrarily decided the instant case with utter disregard for the law of Illinois. This, of course, is totally untrue as can be seen by the fact that though the Court of Appeals had before them for their consideration, the Appellate decision in the *Highland Park* case, they nevertheless withheld opinion in this Edlin case for approximately nine months until disposition of the *Highland Park* case by the highest court of Illinois. This would certainly indicate beyond all doubt, a judicious consideration of all aspects of this case, which should not be lightly set aside.

II.

THERE IS NO CONFLICT OF DECISION.

The contention of conflict between Circuits is without merit. The cases cited merely hold that where a District Court has reached a logical conclusion on a question of doubtful state law, a Court of Appeals will not attempt to outguess the lower court as to a future determination by the highest state court on the same question. In this case the Court of Appeals at the time of decision had a pronouncement on the same question by the highest court of Illinois.

The real argument, however, is that there is in fact no conflict, at least not such conflict as would warrant review by this Court. If there is a conflict, it is a conflict in

dicta or application of principles rather than on the same question of law or fact. The conflict warranting review means that there must be a real conflict on the same matter of law or fact, not merely on inconsistency in dicta or in the general principles utilized, *Wisconsin Electric Co.* v. *Dumore Co.*, 282 U. S. 813; *Sanchez* v. *Barras*, 283 U. S. 798.

III.

THE COURT OF APPEALS CORRECTLY APPLIED THE LAW OF ILLINOIS AT THE TIME OF ITS OPINION.

It is suggested that the rule in *Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U. S. 538, has been misunderstood. That case held that a Court of Appeals must apply the State law declared by the highest court of the state as of the time when the appeal is disposed of and not as of the time when the judgment below was entered.

Though we deny and have so shown that *Beman* v. *Springfield Fire and Marine Ins. Co.*, 303 Ill. App. 554, 25 N. E. 2d 603, ever was authority for the case at bar, we assume for argument that it was applicable. The pronouncement by the Supreme Court of Illinois in the *Highland Park* case prior to disposition of this case made it mandatory for the Court of Appeals to follow the later decision.

Rather than this case confusing the meaning of the *Vandenbark* case, it is clear that the *Vandenbark* case clarified the duty of the Court of Appeals in this case.

IV.

GENERAL.

Petitioners at page 19 suggest the great public importance of the issues here present. There has not been one citation of authority throughout this entire litigation which suggests even one case similar on its facts. Which is, of course, indicative that this unusual and unique fact situation is unlikely to occur with such frequency as to make action by this Court necessary for future guidance of public and private conduct. Indeed, even if it were, decision in this case could not establish a uniform system of conduct throughout these United States. It is conceded throughout that on the legal question presented there is divided and equal authority for opposite view. As stated by the District Court (App. B of Petition, p. 30):

> "There appears to be a conflict of authority in answer to the latter question. One line of authorities which for convenience may be called the "New York Rule" holds that the rights of an insurer and the insured under a fire insurance policy are established as of the time of the fire and loss and that the fact that the insured has ultimately recouped his loss from another source does not relieve the insurer of its liability • • • There is however respectable authority opposed to the New York rule."

A decision by this Court on the merits could not and would not have the effect of resolving the conflict of authority or establishing any uniformity on this question as among the various states. The function of this Court is to resolve conflicts of opinion on Federal questions and to exercise supervisory power of lower Federal Courts. This power would not extend to changing the law of any state as it now, or in the past has existed. Therefore, the public question and evils to be protected against as stated on

page 19 of the Petition would not be accomplished with any degree of uniformity by decision on the merits in this cause.

CONCLUSION.

For the foregoing reasons, this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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December 1959.